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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

No. 336

PERCE HENDERSON, HERBERT L. HALL, JR., NEAL NOLAN, REDNOR AND KLINE, INC., AND THE BURGESS AND TOWN COUNCIL OF THE BOROUGH OF MORRISVILLE, PENNSYLVANIA,

Petitioners,

vs.

THE DELAWARE RIVER JOINT TOLL BRIDGE COMMISSION, AND THE CITY OF EASTON, PENNSYLVANIA,

Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

To the Honorable the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States of America:

Petitioners Perce Henderson, Herbert L. Hall, Jr., Neal Nolan, Rednor and Kline, Inc., and the Burgess and Town Council of the Borough of Morrisville, Pennsylvania, ask the issuance of a Writ of Certiorari to review the judgment of the Supreme Court of Pennsylvania, which dismissed the bill in equity therein.

Jurisdiction

The jurisdiction of this Court is invoked under 28 U. S. C. A. 1257 (3), Judiciary and Judicial Procedure. The decision below was rendered on June 24, 1949 (R. 158).

This Court in *Delaware River Joint Toll Bridge Commission* v. *Colburn, et al.*, 310 U. S. 419, 427 stated "the construction of such a compact sanctioned by Congress by virtue of Article I, § 10, Clause 3 of the Constitution, involves a federal 'title, right, privilege or immunity' which when 'specially set up and claimed' in a state court may be reviewed here on certiorari under § 237(b) of the Judicial Code, 28 U. S. C. § 344."

Petitioners appropriately claimed in the Court below that a federal right, title, privilege or immunity was involved (Answer to Amendment, R. 151a-152a), and the Court below specifically passed upon the question in its opinion (R. 163). The Federal question was therefore properly raised for purposes of this Court's review. (*Manhattan Life Ins. Co.* v. *Cohen*, 234 U. S. 123, 134; *Robertson, Jurisdiction of the Supreme Court*, Sec. 77.

Opinion Below

The opinion below is reported in *Henderson* v. *Delaware River Joint Toll Bridge Commission*, 66 At. (2) 843, 362 Pa. 475 (1949). It is found in the record at p. 158.

Questions Presented

1. Whether Act No. 35 of the General Assembly of the Commonwealth of Pennsylvania, the Act of March 31, 1949, 34 P. S. 3411-3415, was operative to supersede the requirements of Article X, Section (d) of the compact, as amended (Act of the General Assembly of Pennsylvania, Act of June 13, 1947, P. L. 952, No. 256, § 1, 34 P. S. 3401; N. J. L. 1947, c. 283, p. 989, N. J. S. A. 32:8-10, 32:8-11) and as ratified by the Congress of the United States (Act of Aug. 4, 1947,

c. 481, 61 Stat. 752, 754, Article X (d), requiring the consent of the governing body of the municipality for the occupation of its streets, without the consent of the State of New Jersey and the ratification of the Congress of the United States?

2. Whether the Delaware River Joint Toll Bridge Commission, hereinafter called the Commission, was authorized under the provisions of Article X, Section (d), as amended, Pennsylvania Act of June 13, 1947, P. L. 592, No. 256, § 1, 36 P. S. 3401; N. J. L., 1947, c. 283, p. 989, and as ratified by the Congress of the United States, Act of Aug. 4, 1947, c. 481, 61 Stat. 752, 754, Article X (d), to overpass the streets of the Borough of Morrisville without the consent of the governing body thereof?

3. Was the "consent" embodied in the resolution enacted by the City Council of the City of Easton on July 27, 1948, purporting to permit the Commission to occupy city streets for a bridge approach sufficient authority, without compliance with Sections 1057, 1058, and 1059 of the (Pennsylvania) Third Class City Law, Act of June 23, 1931, P. L. 932, 53 P. S. 12198-1057, 1058, and 1059, which requires an ordinance and provides for a referendum upon such ordinance?

Statutes Involved

Article III of the original compact between the Commonwealth of Pennsylvania and the State of New Jersey (Pennsylvania Act of June 25, 1931, P. L. 1352, #1; 1933, May 18, P. L. 827 #1, 36 P. S. 3401; New Jersey Act of June 11, 1934, N. J. S. A. 32:8-1 to 32:8-15), and ratified by the Congress of the United States (Act of Aug. 30, 1935, c. 833, §9, 49 Stat. 1058, 1061) provided as follows:

> "However, anything to the contrary contained in this compact notwithstanding, no property, now or hereinafter vested in or held by any county, city, borough, village, township or other municipality, shall be taken by the commission *without the consent of such munici-*

pality, unless expressly authorized so to do by the Commonwealth or State in which such municipality is located.

Article X (d) of the compact, as amended (Pennsylvania Act of June 13, 1947, P. L. 592, No. 256, § 1, 34 P. S. 3401; New Jersey N. J. L. 1947, c. 283, p. 989, N. J. S. A. 32:8-10, 32:8-11), and as ratified by the Congress of the United States (Act of Aug. 4, 1947 c. 481, 61 Stat. 752, 754) provides as follows:

"Notwithstanding any other provision of this agreement, the Commission shall have the following powers:

* * * * * * *

(d) The Commission may enter upon, use, occupy, enlarge, construct, and improve any street, road, or highway, located within the limits of any municipality, and deemed by the commission to be necessary in connection with the acquisition, construction, improvement, maintenance or operation of any bridge, owned or operated by the commission, or of any bridge approaches, bridge plazas, or approach highways to any such bridge, *subject however to the consent of the governning body of such municipality,* and to such reasonable police regulations as may be established by such governing body." (Italics ours.)

Sections 1 and 2 of Act No. 35 of the General Assembly of the Commonwealth of Pennsylvania, Act of March 31, 1949, 36 P. S. 3411-3415, are as follows:

Section 1. "For the effectuation of its authorized purposes, the Delaware River Joint Toll Bridge Commission, a body corporate and politic (hereinafter referred to as the "Commission"), is hereby granted power and authority to enter upon, use, overpass, enlarge, construct, improve or close any easement, street, road or highway, located within the limits of any municipality in Pennsylvania, or to use, occupy or take property now or hereinafter vested in or held by any municipality in Pennsylvania.

Section 2. "Before entering upon, using, overpassing, occupying, enlarging, constructing, or improving any easement, street, road, highway, or property of any municipality, the Commission shall, in writing, notify the chief administrative officer or governing body of the municipality of its intention so to do, together with the approximate time of the commencement of the work of the Commission affecting such street, road or highway. *It shall not be necessary for the Commission to obtain the consent of the municipality or the governing body thereof for the exercise of any of the powers conferred by this act, any law or compact to the contrary notwithstanding.*" (Italics ours.)

The Third Class City Law of Pennsylvania provides, inter alia, as follows: (Act of June 23, 1931, P. L. 932, Art. X, #1057, #1058; 53 P. S. 12198-1057-1058)

"No franchise or consent to occupy the public streets, highways or other places in any city of the third class shall be given or granted to any person or persons, railroad, railway, gas, water, light, telephone, or telegraph company, or to any public service corporation, *except by ordinance,* and no ordinance for such purpose shall go into effect for thirty days after its final passage" (§ 1057). (Italics ours.)

Statement of the Case

Perce Henderson filed a petition in the Supreme Court of Pennsylvania praying that the Court take original jurisdiction over a bill in equity seeking to restrain the Commission from enlarging an approach on the Pennsylvania side of the existing toll bridge, between Easton, Pennsylvania and Phillipsburg, New Jersey (hereinafter called the Easton bridge) and from constructing a new toll bridge and approaches thereto between Morrisville, Pennsylvania, and Trenton, New Jersey (hereinafter called the Morrisville bridge). The City Council of Easton, Pa. which has passed a resolution consenting to vacate the streets necessary for

such approach upon the presentation to it of detailed engineering plans, and the Burgess and Town Council of the Borough of Morrisville (incorrectly named as the Borough of Morrisville, Pennsylvania) which had refused to grant such consent, were named as additional defendants.

Plaintiff averred that under the Third Class Law of Pennsylvania, consent to the vacation of streets could be given by an ordinance only, not a resolution (Petition for original Jurisdiction, paragraph 14, Bill in Equity, paragraph 14) (R. 16A). Plaintiff in paragraph 11 a of his amended bill averred that all streets in the Borough of Morrisville were to be overpassed (R. 90A). Plaintiff averred further in paragraph 15 that the Commission was not authorized to build overpasses without the consent of the governing body of Morrisville (R. 17A).

The petition of Herbert L. Hall, Jr., Neal Nolan, and Rednor and Kline, Inc., tax-payers and property-owners of Morrisville, to intervene as parties plaintiffs was granted. Petitioners averred that the Commission was not authorized to overpass the streets of Morrisville without the consent of the governing body thereof (Petition for Leave to Intervene, paragraph 14).

The Commission, by an amended answer, alleged that by virtue of Act No. 35, of March 31, 1949, it was empowered to occupy or overpass the streets of any municipality without the consent of the governing body of such municipality. (R. 99A) In its Answer to the Amended Answer of the Commission (R. 151a-152a), the Burgess and Town Council averred, in paragraph 16, that the Act of March 31, 1949, which sought to alter the terms of certain compacts between Pennsylvania and New Jersey and approved by Congress, was not effective, unless such act were also approved by the State of New Jersey and the Congress of the United States.

Upon oral argument of the cause, the Burgess and Town Council of the Borough of Morrisville joined in the prayer of the plaintiffs for an injunction.

The Supreme Court of Pennsylvania dismissed the bill in equity, and held that all Act No. 35 does is to empower the Commission to appropriate municipal property, without obtaining the municipality's consent, in fulfillment of the possible power so to do as anticipated by Article III of the original compact. *Henderson* v. *Delaware River Joint Toll Bridge Commission, et al.*, 66 At. (2) 843, 362 Pa. 475 (1949). The Court held that the Act of 1949 was a valid, appropriate, and effective exercise of the Commonwealth's legislative power, and being dispositive of the plaintiffs' contentions in their entirety, it is an end of the matter. The court stated that it did not need to consider or discuss the remaining questions raised, but that it was sufficient that it found no merit in those contentions (R. 169).

The Court below failed to discuss the effect of Article X (d) of the 1947 Amendment, to the Compact (Present petition, p. 4), which took away from the Commonwealth or the State the power to give its consent in lieu of that of the governing body of the municipality. It is this portion of the compact that petitioners argued below was directly amended and overruled by the unilateral action of the Act No. 35 of 1949. Hence a Federal right under the Compact, as amended, is directly affected. (See *Delaware River Bridge Commission* v. *Colburn*, 310 U. S. 419, 427).

The Court below did not consider the effect that a unilateral change by Pennsylvania has upon the compact entered into with New Jersey, and whether or not Pennsylvania has passed a law which changes the terms of its contract with New Jersey.

No question was raised by the Court below as to the right of Plaintiffs to sue, which must be conceded. (See *Crompton*

v. *Zabriskie*, 101 U. S. 601, 609; *Massachusetts* v. *Mellon*, 262 U. S. 447, 486-487).

Reasons for the Allowance of the Writ

Petitioners respectfully urge that the writ of certiorari to the Supreme Court of Pennsylvania should issue because:

1. This is the first case to reach this Court wherein the validity of the action of one state in unilaterally changing the terms of an interstate compact, which has been ratified by the Congress of the United States, has been challenged. The matter at issue is of much importance since the determination of the issues arising herein enters into and affects the rights of all states which have entered into interstate compacts.

2. After argument of the cause in the Court below, the Legislature of the State of New Jersey refused and failed to pass concurrent legislation to the Pennsylvania Act of March 31, 1949, permitting First Special Session Senate Bill No. 5 to die in the majority caucus of the General Assembly.

3. In so dismissing the said bill, the Court below erroneously decided a question arising under a compact between two states, and sanctioned by the Congress, adversely to Petitioners' contentions; and, it is believed contrary to the purpose and intent of the Congress and the decisions of this Court.

4. In ratifying Section X (d) of the 1947 amendment, Congress required the Commission to secure municipal consent before entering upon, using, occupying, enlarging, constructing, and improving any street located within a municipality. Pennsylvania Act No. 35 of March 31, 1949 seeks to abolish the consent required by the Congress. In so doing, Pennsylvania has not merely supplemented the compact, but repealed and abolished a portion thereof; and taken away

from municipalities a right and power that had been conferred upon them by the compact, as ratified. The Pennsylvania Act in no way touches upon the relationship between the Commonwealth of Pennsylvania and its municipalities, but directly affects the Delaware River Joint Toll Bridge Commission (Federally ratified) and municipalities located within Pennsylvania.

5. The proposal of the Commission to build in Easton the new approach to the Easton Bridge, and to build a new toll bridge at Morrisville would cause great suffering and hardship to the citizens of those communities. Such projects would displace eight hundred persons during a critical housing shortage, and make countless other homes uninhabitable; such projects would force heavy vehicular traffic to pay tolls and direct long-distance traffic over a toll bridge, when in Morrisville such traffic now enjoys a free bridge. In Easton the users of the existing toll bridge have paid tolls for the past twelve years and that bridge will become, in the normal course of events, free within the next ten months. The Commission now seeks by building new approaches at Easton to mortgage that bridge under the same bond issue with the costly new bridge at Morrisville. The bond issue is contemplated to run for thirty years and to aggregate fourteen and one-half million dollars ($14,500,000.00).

6. The decision and opinion of the Supreme Court of Pennsylvania deprives petitioners of a right, privilege or immunity under federal law.

Conclusion

WHEREFORE, your petitioners respectfully request that this Court issue its writ of certiorari, and that the judgment below be reversed.

Respectfully submitted,

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